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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. 364

ZIGMUND A. MILOS, Individually and Trading as
MILOS FORD SALES, Petitioner

v.

FORD MOTOR COMPANY, and
A. W. KENNEDY MOTOR COMPANY, Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

RESPONDENT'S BRIEF AND APPENDIX IN OPPOSITION

FRANK L. SEAMANS
Attorney for Respondent
1000 Porter Building
Pittsburgh 19, Pennsylvania

Of Counsel:
WRIGHT TISDALE
RICHARD B. DARRAGH
HARVEY S. KRONFELD
Ford Motor Company
The American Road
Dearborn, Michigan

JOHN H. MORGAN
1000 Porter Building
Pittsburgh 19, Pennsylvania

SMITH BROS. CO., INC., LAW PRINTERS, 434-436 BLVD. OF ALLIES, PITTSBURGH 19, PA.

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v.

FORD MOTOR COMPANY, and A. W. KENNEDY MOTOR COMPANY, Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

RESPONDENT'S BRIEF IN OPPOSITION

QUESTIONS PRESENTED

1. Is certiorari warranted to review the Court of Appeals' interpretation of "good faith," as defined in the Automobile Dealer Franchise Act, when (a) such interpretation is in accord with the language of the Act and its legislative history, (b) the same interpretation has been adopted by every court of appeals and a substantial majority of the district courts that have considered the matter, and (c) this Court recently denied two petitions for certiorari which complained of the same interpretation of the Statute?

2. Does the decision of the Court of Appeals affirming, on the particular facts, a judgment for respondent notwithstanding the verdict constitute error calling for review by this Court?

COUNTER-STATEMENT OF THE CASE

It would require an unduly long counter-statement to correct all of the erroneous impressions of the facts in this record created by the Petition. Since both the District Court and the Court of Appeals are in agreement, however, as to the facts (District Court Opinion, R. 93a; Court of Appeals Opinion, P. 35),* a short counter-statement should suffice.

In 1955 respondent (hereinafter sometimes referred to as "Ford") reviewed its sales outlets in the metropolitan area of Pittsburgh, Pennsylvania, and decided to open a new dealership in Oakmont, a suburb of Pittsburgh. As car registrations and other data demonstrated, a good market existed in and around Oakmont for low-priced cars, and Chevrolet was outselling Ford in that area (R. 64b-66b, 86b-87b). The Ford car and truck "potential" for the area was found under Ford's standard formula** to be 228 new cars and 30 new trucks (R.47b-48b). This potential was assigned to the dealership point before petitioner (hereinafter sometimes re-

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* References to the Petition for Certiorari or to its Appendices are by page number following a P, such as (P. 15). References to this Brief and its Appendix are by page number following the abbreviation Br., such as (Br. 12). References to Appendices filed in the Court below are by page number following an R, such as (R. 6a or R. 6b). Page numbers using the letter "a" are from Appendix of Appellant below (Petitioner here); the letter "b" refers to Appellee's Appendix below (Respondent here).

** The formula was based principally on sales of the low-priced cars (the "big three") for the preceding three-year period, as shown by actual new car registrations (R. 48b, 86b-87b).

ferred to as "Milos") even applied for the dealership (R. 47b-49b, 69b, 74b).

The foregoing "potential" indicated the type of dealer and dealership facility that would be needed to do the job which the "potential" demonstrated was there to be done, and was *the reason** Ford desired to appoint a dealer in the area (R. 66b, 74b). A dealer who could not or would not do the required kind of a sales job or whose facilities were too small, obviously, was not the right man (R. 69b-75b).

Milos applied for the new dealership and said that he could and would do the job, but the facility that he proposed to use was too small (R. 72b, 74b-76b). He succeeded in convincing Ford, over the better judgment of some of Ford's representatives (R. 72b, 74b-76b), that he should be given the franchise when he promised, in writing, to build a "suitable facility" within two years (R. 49b, 74b-76b; D. Ex. 4, Br. 17, R. 121b).

After granting Milos the franchise on that inducement, Ford applied its standard procedure in converting the "potential" of Milos' area into his share of the monthly Ford car and truck sales objective assigned to the Pittsburgh metropolitan area. By taking the percentage which his potential bore to the potential of the entire Pittsburgh metropolitan area, and applying that percentage to the monthly sales objective assigned to the metropolitan Pittsburgh area, actual numbers of new cars and trucks were assigned to Milos each month pursuant to his Sales Agreement as his sales objective

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* Emphasis in this brief is counsel's unless otherwise indicated.

—as his fair share of the total objective assigned to the Pittsburgh district (R. 42b-45b, 61b-62b).

Thus, Milos received a monthly objective prepared according to this uniformly applied, standard procedure (R. 83b-85b). Milos admits that he received these monthly objectives and that his sales amounted to only about 50% of the objectives assigned to him (See *fn. infra* pp. 13-14). It is apparent that, after he received the Ford franchise, he was just not interested in taking the measures suggested to him to achieve his objectives (R. 103b; D. Ex. 23, Br. 18, R. 143b). He also failed and refused to secure a "suitable" facility within the agreed two-year period (R. 37b; D. Ex. 11, Br. 17, R. 123b).

Eventually, 31 months after his appointment as a dealer, Ford terminated his Sales Agreement, carefully following every step of Ford's established, detailed termination procedure (R. 62b-64b, 115b). Milos' termination was under active consideration for a total of twelve and one-half months, and included separate consideration by Ford's Pittsburgh District Sales Manager (R. 105b-107b); the Regional Sales Manager (R. 109b-111b); the Ford Division General Sales Manager in Dearborn (R. 66b-67b); and two separate hearings before Ford's Dealer Policy Board* in Dearborn, at both of

* One of the chief functions of that Board is to consider any suggestion, complaint or question that any dealer of Ford may have concerning his relations with Ford, including a proposed termination of his franchise. When a hearing before the Dealer Policy Board is requested by a dealer to review a proposed termination of his franchise, the termination does not become effective unless and until it has been confirmed by the Board after full hearing or opportunity to be heard has been given the dealer (Br. 19, R. 112b-113b).

which Milos was represented by counsel (R. 112b-113b, 115b).

The Agreement was terminated for two reasons:

1. Poor sales, and

2. Inadequate facilities (R. 116b; D. Ex. 25, Br. 17, R. 159b; D. Ex. 42, Br. 17, R. 193b-197b).

As to sales, the Agreement obligated the dealer to develop the sale of Ford products to Ford's satisfaction in accordance with reasonable criteria set forth in the Agreement (D. Ex. 42, Br. 17, R. 193b-195b). The record contains a great deal of evidence respecting Milos' poor sales performance. For the year 1956, he achieved only 49.2% of his sales objective for new cars (D. Ex. 19, Br. 18, R. 125b-127b; D. Ex. 52-F, Br. 18, R. 239b), while all Ford dealers in his zone attained an average of 85.1% of their objectives, and the dealers in the Pittsburgh district accomplished 93% of their objectives (D. Ex. 52-F, Br. 18, R. 239b). For the year 1957, Milos achieved only 51.5% of his new car sales objectives (D. Ex. 52-B, Br. 18, R. 235b), while all Ford dealers in his zone attained an average of 90.4% (D. Ex. 52-F, Br. 18, R. 239b), and the dealers in the Pittsburgh district accomplished 95% of their objectives (D. Ex. 52-F, Br. 18, R. 239b).

For the first six months of 1958 (the latest period prior to his termination in August, 1958 for which competitive sales figures were available) Milos achieved only 28.3% (D. Ex. 52-F, Br. 18, R. 239b) of his sales objective for new cars while all Ford dealers in the zone attained on the average 59.8% (D. Ex. 52-F, Br. 18, R. 239b), and the dealers in the district 84.3% (D. Ex. 52-F, Br. 18, R. 239b).

The "reasonable criteria" referred to in the Sales Agreement (D. Ex. 42, Br. 17, R. 193b-195b), by which the Company is to measure the sales performance of a dealer, include the sales performance of the other dealers in his zone and district (D. Ex. 42, Br. 17, R. 195b).

With respect to facilities, the Agreement required Milos to establish, maintain and equip a place of business such as would enable him to meet his sales and service responsibilities (D. Ex. 42, Br. 17, R. 195b-197b). As Milos admitted, his facilities were inadequate when he started (D. Ex. 4, Br. 17, R. 121b), he promised to provide adequate facilities within two years (D. Ex. 4, Br. 17, R. 121b), but he failed and refused to do so (R. 37b; D. Ex. 11, Br. 17, R. 123b). Milos' inadequate facilities contributed materially to his poor sales performance (R. 51b-53b, 111b; D. Ex. 11, Br. 17, R. 123b; Ex. E. of D. Ex. 23, Br. 18, R. 143b).

ARGUMENT

1. The Court of Appeals' Interpretation of the Statute Is Correct and Does Not Warrant Review by This Court.

Petitioner's first argument is that the Court of Appeals erred in deciding that "good faith," as defined in the Automobile Dealer Franchise Act (15 U.S.C.A. § 1221), must be determined in the context of "coercion" or "intimidation," and that this interpretation of the Statute presents "an important question of Federal law, which . . . should be settled by this Court" (P. 15-21). There is no merit to the contention because:

(a) The decision of the Court of Appeals that "good faith", as defined in the Act, must be determined in the context of "coercion" or "intimidation" is supported not only by the language of the Act but by its Congressional history as set forth in the opinion (P. 39, 41).*

* Significantly, petitioner cites no Congressional history in support of his broad construction of "good faith", but says that the courts should look to the Sales Agreement between the parties in order to determine the meaning of those words under the Act (P. 19). This concept is as fallacious as it is strange. Even assuming *arguendo*, and contrary to the fact, that the Sales Agreement purported to construe the Act, this would be wholly beside the point, which, of course, is to determine what *Congress* intended in enacting the Statute.

Moreover, petitioner's argument, if adopted, would lead to unjust and absurd results. It would mean, for example, that a manufacturer which had fair and equitable franchise agreements with its dealers, or agreements which contained words such as fair and equitable, would be held to a more stringent standard of "good

(b) Two other Courts of Appeals have had occasion to rule on this point. Both have agreed with the interpretation adopted by the Court of Appeals in this case and in the case of *Garvin v. American Motor Sales Corporation*, 318 F.2d 518 (3rd Cir. 1963), decided shortly after this case. Those courts are the Court of Appeals for the Fifth Circuit in *Woodard v. General Motors Corp.*, 298 F.2d 121, 128 (1962), *cert. denied* 369 U.S. 887 (1962), *rehearing denied*, 370 U.S. 965 (1962) and the Court of Appeals for the Second Circuit in *Pierce Ford Sales, Inc. v. Ford Motor Company*; 299 F.2d 425, 430 (1962) *cert. denied* 371 U.S. 829 (1962).

(c) Thus, all three Courts of Appeals that have passed on this question have agreed on this interpretation. *There is no conflict among the courts of appeals.*

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faith" under the Act than a manufacturer which did not have such agreements with its dealers. Congress certainly did not intend to work any such discrimination. In fact, petitioner himself recognizes the fallacy of his argument by pointing out that the Act created a new cause of action which is not dependent upon contractual obligations as expressed in the franchise agreement (P. 15).

* Petitioner quotes one sentence from the Court of Appeals' opinion in the *Woodard* case, *supra*, (P. 16-17), wholly out of context, in an attempt to create the impression of conflict among the courts of appeals as to the interpretation of the Act. A quick perusal reveals, however, that the *Woodard* opinion is in complete harmony with the opinion below in this case and the other appellate decisions which have construed the Act. The Court below was of this view since it cited the appellate decisions in both the *Pierce* and *Woodard* cases in sup-

(d) Just last year this Court denied petitions for certiorari of former automobile dealers which asserted that the Court of Appeals for the Fifth Circuit in *Woodard v. General Motors Corporation*, 369 U.S. 887 (1962), *rehearing denied* 370 U.S. 965 (1962), and the Court of Appeals for the Second Circuit in *Pierce Ford Sales, Inc. v. Ford Motor Company*, 371 U.S. 829 (1962), adopted the same allegedly erroneous interpretation of the Statute that Milos charges in the present petition. In the *Woodard* case, the petitioners complained that the Court of Appeals improperly sustained a summary

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port of its interpretation of the Statute (P. 40). Indeed, the one sentence from *Woodard* upon which petitioner relies actually supports respondent's, and not petitioner's, position because it states that a dealer has a cause of action under the Act only if the actions of the manufacturer are both "not fair and equitable *and* are coercive."

The three district court cases cited by petitioner (P. 18) are simply in conflict with the plain language of the Act itself, its legislative history, all of the appellate decisions and a clear majority of the district court cases which have decided the meaning of "good faith" under the Act. One of the cited cases, *Barney Motor Sales v. Gal. Sales Co.*, 178 F. Supp. 172 (S.D. Cal. 1959), was criticized by the Court of Appeals in *Woodard*, at p. 128, because the decision "overlooked" the statutory definition of "good faith". The same criticism applies to the other two, *Blenke Bros. v. Chrysler Corporation*, 189 F. Supp. 420 (N.D. Ill. 1960) and *Globe Motors v. Studebaker-Packard Corp.* (CA 60-502, W.D. Pa. 1962, unreported). In any event, conflicts between decisions of courts of appeals and district courts are no basis for granting certiorari since it is the responsibility of the courts of appeals, and not this Court, to resolve such conflicts. Stern and Gressman, *Supreme Court Practice* (3rd Ed. 1962) § 4-8, p. 131.

judgment for the defendant automobile manufacturer, and argued that the writ should issue because in requiring "good faith" to be determined in the context of coercion, "the court below erroneously decided an important question of Federal law . . .": (p. 15, Petition for Certiorari in *Woodard*). Certiorari was denied (369 U.S. 887). In the *Pierce* case, the Court of Appeals for the Second Circuit reversed a judgment for the plaintiff entered by the District Court and entered judgment, notwithstanding the verdict, for the defendant. In the petition for certiorari in that case, the dealer complained that the Court of Appeals erred in the "Construction of the Automobile Dealer . . . Act" (p. 22, Petition for Certiorari in *Pierce*) when the same interpretation here adopted was made. Certiorari was denied (371 U.S. 829).

(e) The following District Courts have interpreted the Act in the same way as did the Court below: *Augusta Rambler Sales, Inc. v. American Motor Sales Corp.*, 213 F. Supp. 889, 893 (N.D. Ga. 1963); *Leach v. Ford Motor Company*, 189 F. Supp. 349, 354-355 (N.D. Cal. 1960); *Staten Island Motors, Inc. v. American Motors Sales Corp.*, 169 F. Supp. 378, 382 (D.N.J. 1959); *Pinney & Topliff v. Chrysler Corp.*, 176 F. Supp. 801, 809-810 (S.D. Cal. 1959); *Bateman v. Ford Motor Co.*, 5 CCH Tr. Reg. Rep., Para. 70, 652 (E.D. Pa. 1963); *Bergen Rambler, Inc. v. American Motor Sales Corp.*, 30 F.R.D. 334, 336-337 (D.N.J. 1921).*

* In an early article on the Act, Professor Kessler urged this interpretation. "Automobile Dealer Franchises: Vertical Integration by Contract", 66 Yale Law Journal 1135, 1171-1180 (1957).

In a nutshell, the interpretation of the Statute by the Court below is plainly correct, and this Court should deny the writ as it did in the *Woodard* and *Pierce* cases, *supra*.

2. The Decision Below Affirming, on the Particular Facts, the Judgment for Respondent, Notwithstanding the Verdict, Is Proper and Does Not Merit Review by This Court.

Petitioner's second and final argument is that there is "a substantial basis for the jury's verdict" (P. 23) and that, accordingly, the decision below affirming the judgment for respondent, notwithstanding the verdict, deprived him of his right to a trial by jury (P. 22-33). This contention, like petitioner's first argument, is without merit.

It is fundamental that the granting of a motion pursuant to Rule 50 of the Federal Rules of Civil Procedure, for judgment notwithstanding the verdict in cases where the verdict is not supported by substantial evidence, does not violate the Seventh Amendment to the Constitution. *Galloway v. United States*, 319 U.S. 372 (1943), *rehearing denied* 320 U.S. 214 (1943). See also *Baltimore & C. Line v. Redman*, 295 U.S. 654 (1935); *Coughran v. Bigelow*, 164 U.S. 301 (1896); *Manaia v. Potomac Electric Power Co.*, 268 F.2d 793 (7th Cir. 1959), *cert. denied* 361 U.S. 913 (1959); *Brunet v. S. S. Kresge Co.*, 115 F.2d 713 (7th Cir. 1940), *cert. denied* 313 U.S. 577 (1941).

Contrary to the petitioner's suggestion (P. 22-23), the actions of the Courts below, in entering and affirm-

ing a judgment for respondent, do not present a constitutional question. The question merely is whether the record contains substantial evidence supporting the verdict, i.e., evidence which does not allow speculation to do duty for probative facts. *Galloway v. United States*, *supra*. Even petitioner recognizes that this is the question, for he devotes a third of his petition (P. 23-34) to argument attempting to "demonstrate a substantial basis for the jury's verdict" under the evidence (P. 23).

Both of the Courts below have decided this question in respondent's favor, and they were clearly right. There is no need, and we do not propose here, to make an elaborate refutation of the various arguments that petitioner has advanced. Suffice it to say that, by resort to gross distortion of the facts and limitless unfounded conjecture, petitioner has done his unsuccessful best to make the record appear to be what it is not. This is not new, for these same arguments were presented to and rejected by both Courts below. Petitioner has had his day in court.

Milos' termination as a Ford dealer stemmed solely from poor sales and poor facilities, grounds expressly recognized in the Sales Agreement. The decision to terminate was made only after long and careful deliberation by a number of Ford executives, and the termination became effective only after it was ultimately affirmed by the Dealer Policy Board after two separate hearings (R. 62b-64b, 112b-113b, 115b).

The only evidence that Milos offered at the trial concerning his sales performance was (1) his vague statement about being told that his sales *potential* was

"somewhat into 200 cars per year" (R. 117b)* and (2) the testimony of Mr. Kennedy, a neighboring Ford dealer, that he always regarded himself as a 300-car-a-year dealer both before and after Milos was appointed (R. 54a). Every other item of evidence whereby petitioner's sales performance might be measured was supplied by respondent. All of respondent's evidence stands without contradiction, dispute or objection. It includes, among other things, the facts as to the actual car sales made in petitioner's area, as revealed by official registration data (D. Ex. 52-C, Br. 18, R. 237b). These showed that the market was there. It includes also petitioner's admissions that (1) he did not fulfill the sales objectives which were assigned to his dealership pursuant to his Sales Agreement, having achieved only 50% or less**, and (2)

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* Petitioner argues that this statement about his sales potential constitutes the agreement with respondent regarding his sales responsibilities (P. 25). The argument is fallacious. It ignores the written, integrated Sales Agreement between the parties, and particularly paragraph 2(a) thereof entitled "Sales and Service Responsibility", which the Court of Appeals quotes (P. 41) and properly applied as the standard by which petitioner's sales performance should be measured.

** The following is an excerpt from petitioner's testimony in the District Court:

[744] "Q. All right. Now, the only reason in calling this before you is that we do have an exhibit here [Defendant's Exhibit 19] which you acknowledged to have been shown and discussed with you; and, this shows, does it not, Mr. Milos, that in the year 1956, the objectives assigned to you by the Ford Motor Company were 236 cars, of which you sold 116; that is correct, is it not?

A. Yes.

that he failed to fulfill his commitment to provide additional facilities, despite his own assessment that his facilities were inadequate (D. Ex. 11, Br. 17, R. 123b).

Furthermore, petitioner does not, as we understand the petition, even contend that respondent coerced or intimidated him. Instead, he argues (P. 23-33) that the evidence, correctly evaluated, justified the jury in finding that:

> "Respondent failed to act in good faith in the assignment of sales objectives to Petitioner and in the evaluation of Petitioner's sales performance from such unreasonable bases." (P. 30—as to sales)

Q. All right, sir. And there are other figures regarding objectives on this exhibit, aren't there?
A. Yes, there is.
Q. All right, sir. Now, for the year 1957, you did [745] only about 50 per cent of you [sic] new car objectives; that's right, is it not?"

* * * * * * * *

"Q. You did about, only about 50 per cent of the objectives assigned to you by the Ford Motor Company; is that right, sir?
A. As far as I remember, I recall something in regards to 50 per cent, yes. Whether it was exactly that, I don't know.
Q. But that is approximately—
A. Approximately what I can recall, yes."

* * * * * * * *

[747] "Q. Yes, we understand. I am just trying to establish that figure. That is a fact, is it, that for the first six months of 1958, you sold less than 50 per cent of the new cars in the objective assigned to you by Ford?
A. Yes."

"Respondent was completely unfair, inequitable and unjustified in their actions in terminating this contract for the reason of inadequacy of facilities."
(P. 33—as to facilities)

Even if such contentions were supported by the evidence, which they are not, they would fall far short of making out a case of coercion or intimidation in violation of the Statute.

Thus, the Court below was plainly right in holding that (P. 44);

"The sum of all this is that the record is devoid of any evidence which would support a jury finding that the termination of plaintiff's franchise resulted from the failure of Ford to act in 'good faith' as that term is defined in the Automobile Dealers Day in Court Act."

Finally, the decision below was based on the particular facts of this case, and, therefore, is not the kind that merits review by this Court. As Justice Brennan said (In Chambers) in *Appalachian Power Co. v. American Institute of Certified Public Accountants*, 4 L.Ed. 2d 30, 32, 80 S.Ct. 16 (1959):

"But ordinarily an application by a District Court of the Rules of Civil Procedure when affirmed by the Court of Appeals will not be reviewed by this Court. This is particularly true where, as here, the question is one that concerns the judgment of the District Judge in relation to a particular set of facts."

Petitioner's second and final argument, therefore, should not move the Court to issue the writ.

CONCLUSION

The law is clear and there is no conflict. The case depends upon its particular facts and the decision below is correct. The petition for writ of certiorari should be denied.

Respectfully submitted.

FRANK L. SEAMANS
Counsel for Respondent

WRIGHT TISDALE
RICHARD B. DARRAGH
HARVEY S. KRONFELD
JOHN H. MORGAN
Of Counsel

APPENDIX

Transcript Excerpts

[30] *Mr. Rosenzweig*: Plaintiff offers into evidence Defendant's Exhibit 4.

Mr. Seamans: No objection, Your Honor.

The Court: The exhibit is admitted.

* * * * * * * *

[106] *Mr. Rosenzweig*: Plaintiff's offer into evidence Defendant's Exhibit 42, which is the April 1st, 1957 contract between the Ford Motor Company and Milos Ford Sales.

Mr. Seamans: No objection, Your Honor.

The Court: The exhibit is admitted.

* * * * * * * *

[108] *Mr. Rosenzweig*: Plaintiff's offer into evidence Defendant's Exhibit 11.

Mr. Seamans: No objection, Your Honor.

The Court: The exhibit is admitted.

* * * * * * * *

[177] *Mr. Rosenzweig*: We offer into evidence Defendant's Exhibit 25.

Mr. Seamans: There is no objection, Your Honor.

The Court: The exhibit is admitted.

[647] *Mr. Seamans*: May it please the Court, I would like at this time to offer in evidence Defendant's Exhibit 51-A, 51-B, 50 and 19, which were used in the course of the examination of Mr. Fitch.

* * * * * * *

The Court: All right the exhibits are admitted.

* * * * * *

[1004] Q. That is all.

If your Honor please, we will offer in evidence defendant's exhibit, I believe it is 23?

* * * * * * *

[1005] *Mr. Rosenzweig*: No objection.

The Court: The exhibit is admitted.

* * * * * *

[1123] Q. Thank you, Mr. Foster.

If your Honor please, that concludes my cross-examination, except that I would like at this time to offer in evidence exhibits 52B, C, D and E, which are the charts on the easel which summarize the data which is in evidence in the various statistical exhibits.

* * * * * * *

[1124] *Mr. Rosenzweig*: No objection.

The Court: The exhibits are admitted.

* * * * * * *

[1203] I beg your pardon, Your Honor, may I again offer 52-F, which is the chart on the easel?

Mr. Rosenzweig: No objections.

The Court: The exhibit is admitted.

* * * * * * *

[1217] Q. Well, Mr. Freese, now tell us what is the purpose and function of the Dealer Policy Board?

A. Well, the function of the Dealer Policy Board is actually to form a fourth—really a fourth channel of communication on dealer matters for the Board of Directors and management. We have a field sales force. We have dealer councils and we have sales training establishments and the Dealer — Dealer Policy Board was formed for the purpose of establishing a continuing and regular place where any dealer having any complaint, criticism or suggestion that he might want to make with respect to any company policy or action could bring that matter, and insure that it would be give.. a—a—immediate—relatively immediate and prompt attention and that his thoughts or ideas or complaints or criticisms would be given certain top [1218] management consideration.

One of our functions they delegated to us, and I might say we're—this is a result of a resolution of the Board of Directors, is they reposed in us the authority to rescind or confirm the giving of any notice by any officer of the company of a notice of termination. We have the sole authority in the company to rescind or confirm that notice.